

STREPTOE & JOHNSON LLP  
ATTORNEYS AT LAW

Samuel M. Sipe Jr.  
202-429-6486  
ssipe@streptoe.com

1330 Connecticut Avenue, NW  
Washington, DC 20036-1795  
Tel 202-429-3000  
Fax 202-429-3902  
streptoe.com

231148  
231149

October 20, 2011

ENTERED  
Office of Proceedings

OCT 20 2011

Part of  
Public Record

**VIA ELECTRONIC FILING**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423-0001

Re: ***Canexus Chemicals Canada L.P. v. BNSF Railway Company,***  
**STB Docket No. 42131 & Finance Docket No. 35524**

Dear Ms. Brown:

I am writing on behalf of BNSF Railway Company ("BNSF") to respond to the claim of Canexus Chemicals Canada L.P. ("Canexus") that BNSF violated the Board's rules governing the confidentiality of Board-sponsored mediations and its associated request to strike.

In its October 20, 2011 Reply to Petition of BNSF Railway to Vacate the Emergency Service Order and Establish a Procedural Schedule to Address Complainant's Common Carrier Claims ("Canexus Reply"), Canexus asserts that BNSF "violated the Board's rules governing mediations by revealing details of" the recent unsuccessful mediation in this proceeding. Canexus Reply at 2. Canexus specifically complains about the statement in BNSF's October 17, 2011 Petition to Vacate the Emergency Service Order and Establish an Expedited Schedule to Address Complainant's Common Carrier Claims ("BNSF Petition") that "while the substance is confidential, Canexus has also rejected the commercial terms offered to it for continued service to Kansas City by BNSF during the STB-sponsored mediation." BNSF Petition at 2. Canexus asks the Board to strike this statement from the record.

Canexus's claim that BNSF disclosed details of the mediation is plainly not true. BNSF did not disclose the substance of the discussions that took place between BNSF and Canexus at the mediation nor any terms of a settlement proposal. Indeed, BNSF took care to point out that it was not disclosing the substance of the discussions. BNSF respected the confidentiality of those discussions by not revealing any details about the commercial terms that BNSF offered or the reasons that the commercial terms were rejected. BNSF stated only that it had made a commercial offer, which is not particularly surprising from the fact that the mediation took place,

Ms. Cynthia Brown  
October 20, 2011  
Page 2

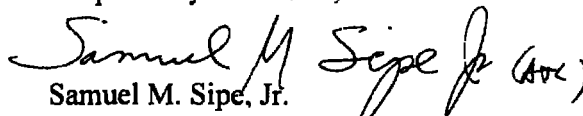
STEPTOE & JOHNSON LLP

and that Canexus turned down the offer, which is clear from the fact that the mediation was unsuccessful.

In disclosing that it made a commercial offer in the mediation (without disclosing the substance of that offer) and that Canexus rejected that offer, BNSF was accommodating the goal of confidentiality in mediations with the Board's need to be privy to shipper/carrier discussions for purposes of issuing an emergency service order. The Board has recognized in the context of emergency service orders that the Board needs to know whether discussions have taken place between the affected shippers and the incumbent railroad. Indeed, the Board's alternative rail service regulations *require* that a petition for alternative service must include evidence of the discussions that have taken place between the incumbent railroad and the petitioner. 49 C.F.R. § 1146.1(b)(ii). In *Albemarle Corp.—Alternative Rail Service—Line of the Louisiana and North West Railroad Company*, STB Fin. Docket No. 34931, at 2 (STB served Oct. 6, 2006), the Board rejected a motion by a shipper seeking an emergency service order to strike evidence submitted by the incumbent rail carrier that the shipper and the railroad had engaged in settlement discussions relating to alternative service. The Board rejected the motion on grounds that section 1146.1(b)(ii) of its regulations make it clear that such information is important to determining whether an emergency service order is warranted. Section 1146.1(b)(ii) is not technically applicable here because Canexus did not ask for the emergency service order. But the regulation reflects that it is important that the Board be aware of discussions between a shipper and the incumbent railroad in situations involving emergency service orders.

Therefore, BNSF does not believe that there is a valid basis for Canexus's claim that BNSF improperly disclosed information about the mediation. Nevertheless, if the Board believes that it was not appropriate to disclose the fact that BNSF had extended an offer to Canexus in a mediation designed to resolve the parties' dispute, BNSF would not object to striking the statement from the record.

Respectfully submitted,

  
Samuel M. Sipe, Jr.  
Counsel for BNSF Railway Company

cc: Counsel of Record